The Jurisdiction of the States over their Navigable Waters.

ARGUMENT

OF

ROSCOE CONKLING,

IN THE

TROY AND WEST TROY BRIDGE CASE,

IN THE CIRCUIT COURT OF THE UNITED STATES,

At Utica, August 6, 1873,

BEFORE

MR. JUSTICE HUNT,

IN OPPOSITION TO A MOTION FOR AN INJUNCTION TO RESTRAIN THE ERECTION OF A BRIDGE OVER THE HUDSON RIVER.

UTICA, N. Y.
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For the Defendants.

CIRCUIT COURT OF THE UNITED STATES.

IN EQUITY.

CHARLES A. SILLIMAN,

agst.

TROY AND WEST TROY BRIDGE COMPANY, *et. al.*

The Hudson River at the point in question, is six hundred and seventy-two feet wide, and the tide of the ocean one hundred and fifty miles away, causes it to rise and fall two feet. Troy with 50,000 and West Troy with 20,000 inhabitants, come to the water's edge on opposite banks. The neighboring communities needing a crossing between these places, as their census appears from the moving papers, number 122,000 people. The necessity shown by the defendants is even more widespread. The stream is too deep to ford, and there is no mode of passing it except a perilous track on an out-of-the-way railroad bridge, "almost continually," thronged by locomotives and trains, and a precarious and unsafe single boat ferry plying a portion of the year, together with a small tug for foot passengers higher up.

About a mile and a quarter above the site of the bridge in controversy, the Hudson has long been dammed. At this point, a lock admits small vessels, which are twenty-two minutes each in passing the lock. From Troy to Albany, the Erie Canal runs parallel to the river. Below the dam, and about three-quarters of a mile above the disputed erection, the river has for thirty years been spanned by a railroad bridge, but twenty-five feet above the water, with but a single draw of fifty feet. Six miles below Troy, the river has been bridged for eight years, and two years ago it was bridged a second time. These two bridges are

thirty feet high—the upper one with two draws of one hundred and eleven, and the lower one with two draws of one hundred and seventeen feet each.

The Hudson rises in the State of New York, and flows wholly in that State, till it washes New Jersey just before reaching the sea. All these bridges were built by authority of New York, all were the subject of thorough legislative and judicial scrutiny, and, though devoted to railways, all are great and acknowledged public improvements, and harmless to navigation.

On the 23d of April, 1872, the State, refusing a charter to the ferry-partner of the complainant, for a bridge but twenty feet high, which an attempt was made to obtain for a site one block below, authorized an intermediate drawbridge—not a railway bridge, but a public bridge—at Congress Street, Troy. This site, is lower down than the dam and upper bridge, and higher up than the two lower bridges. The foot of Congress Street was fixed as the site by the statute, (section 1;) the dimensions of passage ways for vessels were also prescribed; immediate effect was given to the statute, urgent diligence was enjoined in prosecuting the work, and the bridge was required to be ready for use within two years. (See Bill, p. 8.)

Observing the times fixed by the statute for successive steps, those charged with the erection proceeded vigorously and openly. Troy ceded Congress Street for the purpose, and West Troy, Genesee Street, the corresponding street across the river. Books were opened, public notices given as required by the statute, directors and officers chosen, stock subscribed, surveys and plans made, legal proceedings to acquire property taken, and by September 18th, 1872, the contracts were executed for the masonry and iron, which, by law, must constitute the bridge.

The western abutment, and western land pier, have been completed. The piles foundation for the western rest pier, have been driven, and a caison placed there, in which mason-work is progressing. The foundations of the turn-table pier, are partly constructed. A coffer-dam for the eastern pier, is far advanced. Excavations for the remaining pier, have been made. A costly culvert, two hundred and thirty feet long, has been nearly completed. The iron superstructure, is done, and parts of it, are already on the piers. Large quantities of material have been

purchased, some of which is in transit, and some already delivered; and one hundred and fifty men are engaged in the erection. $150,402.03 has been actually expended, and the work successfully and constantly proceeds.

The bridge is to be two feet higher than the statute requires, two feet higher than the bridges below, and seven feet higher than the railroad bridge above; the draws are eleven feet wider than the statute requires, and the spans much wider than those above or below, and much wider than the statute exacts. The aggregate space in the river occupied by all the piers, is to be forty-two feet in width, leaving six hundred and thirty feet, or thirty-eight rods, of clear water way, with draws equal to those of the upper Albany bridge, and every other space for vessels, greater, both in elevation and span.

Months after the statutory days on which proceeding after proceeding took place, by which rights became vested; months after the organization of the Bridge Company, after its stock was subscribed, and its surveys and plans were completed, weeks after the contracts for the bridge were finally concluded, and twelve days after the coffer-dam for the eastern pier had assumed its position, the complainant filed his bill. This was on the 16th of October, 1872. The defendants answered on the 2d of January, 1873, denying all the equities of the bill, and from that time till the 3d of July, 1873, the complainant lay on his oars. The statute required the work to go on, and it did go on in open view, the State on the 22d of April, 1873, re-enforcing it by an act of the Legislature authorizing an increase of stock or an issue of bonds. Three days after the bill was filed the complainant was served with legal notice that immediate and important steps in the enterprise, were about to be taken, but for eight months he remained mute. In the fifteenth month of the work, to which the law gave but twenty-four months, and the elements not so long, and which is to be done in fact January 1, 1874, the complainant started up and asked an injunction "pending this suit." With a statute before him, which he had sought to defeat in the Legislature by a rival charter, forecasting the bridge from step to step, in time, place, form, material, location of piers, and dimensions—with expensive proceedings and costly operations constantly going on, of which ignorance can not be pretended—with no freshly acquired right, or newly dis-

covered ground of complaint, the complainant stood quietly by six months before the formal act of filing his bill, and eight months afterwards; and this, when the statute left nothing to uncertainty, and tolerated no pause or delay in building the bridge, unless compelled by a mandate of the Court.

Now, when great sums have been expended, and large engagements made, when costly structures are more than half completed, and the next four months must put them in condition to weather the elements, or leave them exposed to destruction, the complainant wakes up his dormant suit, and giving no excuse for his delay, he asks a court of equity to drive the defendants from their work, and to leave it to the freshets and the frosts. As if to add wantonness to the proceeding, the motion is made on affidavits sworn to last year, or in the very beginning of this. Even the formal affidavit of Mr. McClellan, the solicitor, was sworn to March 11, 1873.

Such an exertion of power must of course proceed, if at all, on the grounds, 1st, that the complainant has a clear right; 2d, that he has no remedy at law for any injury he may suffer; 3d, that he has pursued the remedy asked, promptly and diligently; 4th, that between now and the first of January, irreparable injury will be inflicted on the complainant by the completion of the bridge, or else that the interest of the defendants will be conserved by preventing their making further expenditures; 5th, that the bridge will be a nuisance, and will, in legal sense, interrupt the free navigation of the Hudson; 6th, that offense has been done, or is threatened, by the State of New York to the Constitution or Laws of the United States, and that this Court has jurisdiction in the premises, at the suit of a part owner of a barge and canal boat, licensed, for one year, and no more, in the coasting trade.

These positions must all be maintained, before the Court will exert one of its most summary and exalted powers.

This outline of the case assumes that some intendments of the bill, and some statements of the moving papers, are foreign to the case, and that some incidental matters are settled, past dispute, by uniform decisions.

1. A complainant has been selected, who could formally aver that he is a citizen of New Jersey. This fact gives him no right beyond entrance to the Court.

For all purposes, except to gain a hearing from this particular tribunal, he might as well have averred that his name is Silliman, and that the family appeared as complainant and affiants in the Albany Bridge case also. Membership of the Silliman family, quite as much as citizenship of New Jersey, constitutes a right to guard the navigation of the Hudson River, and to challenge the police power and jurisdiction of the State of New York.

The complainant may obtain his footing in Court by reason of his personal right as citizen of another State, and then the case instantly assumes all the bearings it would have in a State Court. His extra—State residence, gives him only a choice of forum, and having made his choice, he is at once on an equality in all things else, with any other suitor.

If the statute of New York assailed in the bill, would withstand a citizen of New York, or if it would withstand the complainant in a State Court, it will prevail here by exactly the same right.

(Passaic Bridge cases, and numerous cases to be cited presently.)

2. The fact that an arsenal of the United States, stands on the Hudson, is wholly immaterial: and so is the allegation that Congress has at times appropriated money to improve the river. The arsenal is below the site of the bridge in question, and therefore, as matter of fact, no interest of the United States in that regard is involved.

The averment is introduced, however, to piece out the argument, that the commercial clause of the Constitution has, as to this river, and this suit, been vitalized by legislation under it.

The answer to this is, that appropriations by Congress for improvements of rivers and harbors, are made never under the power to regulate commerce, but always under the power to appropriate money for the common defense and general welfare.

If the commercial clause of the Constitution, for the purpose of the complainant, needs galvanizing by legislation under it, appropriations of this kind will not do.

3. Troy is alleged to be a port of delivery. This has no bearing on the case. The complainant must stand on his right to navigate the Hudson, and must show damage to that right.

His coasting license is founded solely on an act of Congress approved February 18, 1793. If any act makes Troy a port of

delivery, it is quite modern, and has no relation to the complainant, and his right to this suit is not affected by it.

> Passaic Bridge cases, 3 Wall, 782, (see pp. 791, 793.) Wheeling Bridge case, 13 How., 586 per ch. J. Taney. Gillman vs. Philadelphia, 3 Wall, 713.

4. The moving affidavits dwell on "tows," and abound in fears that "tows" may be troubled in passing the spans and draws.

"Tows" are not coasting vessels, or registered vessels, or vessels of the United States. A "tow," even made up wholly of licensed vessels, would not be a licensed craft, any more than a raft would be.

The little annual certificate, fixed in its every word by the act of 1793, commonly called a coasting license, has sometimes been invested by ingenuity and eloquence with marvelous and awful attributes, but it has never been stretched to cover leviathans made up of a crowd of boats, strung on hawsers, and spread out in tiers. Beside, the complainant does not "tow," he is not a tug owner towing boats, or running to and fro at Troy as a lighter or shifter of vessels from berth to berth, or wharf to wharf: he tells us that his barge and his canal boat have "for a long time been regularly employed in carrying on the coasting trade between the port of Troy and ports in various other States;" and the canal boat between Buffalo and New York. He therefore, cannot uphold his suit in the interest of "tows."

Again, the moving affidavits insist that the erection of the Albany bridges has dismembered Troy's "tows." These broad flotillas now go piece-meal to a point below the Albany bridges, and in so doing pass through spaces smaller than those of the proposed bridge.

5. The allegation that inconvenience may happen to passenger boats, in which the complainant has no interest, is wholly beside the issue before the Court. The complainant must stand on his own feet; he cannot maintain his suit upon the rights of those for whom he cannot speak, and whose voice is in truth against him.

What has the tonage of Troy to do with this motion? Does Troy, or do the owners of her tonage, complain?

The "ferry interest," a half dozen strong, alone complains. Being a creature of the State, the "ferry interest" could hardly, in *its*

own name, deny the same State authority by which it lives: this would be like a tenant denying his landlord's title—so the "ferry interest" complains and swears at progress, through its individual members. The parade of tonage, plays an instructive part in the case, however—it characterizes the bill and affidavits, and reveals their spirit.

Read the statement of Robert F. Silliman, and then read the affidavit of Robert Robinson, and of Richard Vandercar, and of Alfred Mosher. Two of these affiants represent a large part of the whole transportation interest at Troy. Read also the affidavit of the twelve dock owners. If these passages prove anything, they prove an arrant attempt to exaggerate and fabricate pretenses of complaint.

No supposed injury to riparian owners, or municipalities, or even to navigators, other than the complainant, can uphold the bill. It must rest on the right of the complainant alone; and facts touching others, can be pertinent only so far as they bear upon the allegation that the bridge is a nuisance, and that he will be prevented from freely navigating the Hudson with his two boats.

Wheeling Bridge case, 13 How., 566. Ibid, 589, per Ch. J. Taney. 6 Johns., Ch. Rep., 439. 12 Peters, 98.

The right of the complainant to navigate the Hudson, is the only thing this motion protects, though the author of the bill seems to have supposed that the canals of New York, as well as the Hudson river, belong either to the General Government, or to the Circuit Court of the United States.

6. Much effort has been given to disproving the necessity for the bridge. The bill and moving affidavits are a traveler's guide, telling how to get into Troy, and how to get out again, and how other places may be reached from Troy, mostly by ferry, and all without the bridge. The census and the map, unaided by the answer and affidavits of the defendants, show the urgent need of a bridge; but how can the Court deal with the fact, be it one way or the other?

If New York has not the power to authorize the bridge, the necessity for it, cannot legalize it. If New York has the power to authorize it, it is lawful, whether the need of it be imperative, or slight, or imaginary. If the bridge invades the Constitution or laws of the United States, the Court cannot indulge the inva-

sion because of its convenience. If the bridge is protected by the shield of New York, the Court cannot molest it, though it should stand forever an unvisited and costly monument of folly.

Whether New York has power to build a bridge on her own soil, may be a judicial question for the Courts of the United States; but whether she shall or shall not exercise her power, is a question for New York alone. The wisdom or the folly, the need or the uselessness, of any work which a State has the power to construct, is not a judicial, but a political question—it belongs not to Courts, but to the Legislature, and the statute being enacted, until it is repealed, there is no forum in which it can be overruled or gainsayed.

Stripped of its wrappings, and relieved of the delay of the complainant, the case can present but two questions touching the validity of the charter—*First*, has New York power to bridge the Hudson at Troy?—and *Second*, is the particular bridge projected, such an one as will, in the sense of the law, violate rights which the complainant holds under the Constitution or laws of the United States?

7. The State of New York is the party complained of, and the only one. The bill alleges that the defendants are proceeding according to the charter, and therefore, though the State employs a corporation as its agent, the act of building the bridge, is the act of the State itself, as much as if its own engineer and officials placed the stones and drove the bolts.

> **Beekman vs. the Saratoga R. R. Co., 3 Paige, 45. Bloget vs. Mohawk and Hudson Co., 18 Wend., 1.**

These views will be supported by authorities upon which the defendants maintain three positions:

First, that in any aspect of the case, the order now asked for, does not fall, nor does the final decree prayed for, fall within the jurisdiction of the Court.

Second, that if the Court reaches and entertains the enquiry whether in truth the bridge will infringe the right of the complainant to the free navigation of the Hudson, then the case of the complainant fails in law, and is disproved in fact.

Third, that any right the complainant may have had, to a provisional injunction, has been lost, and the defendants will be left to abide the responsibility of their acts when the consequences have been demonstrated by experience.

FIRST.

The Hudson River, with its bed and its banks, is part of the State of New York. Congress, in the words of the Constitution, has "power to regulate commerce with foreign nations, and among the several States." Therefore Congress may regulate commerce on the Hudson River; but neither more or less than it may regulate commerce in every part of every one of the United States. Commerce, has been held to include navigation, and so the right to traverse navigable streams with vessels, must be deemed among the things within the protection and regulating power of Congress. Resting upon this ground, are several statutes, all the attributes of which material to the present case, are found in the "act for enrolling and licensing ships or vessels to be employed in the coasting trade or fisheries, and for regulating the same. Approved Feb. 18, 1793. (Statutes at Large, 305.)

These enactments do not confer primacy or supremacy; they do not endow those to whom they apply with the freedom of corsairs; they do not make the holder of a coasting license a chartered libertine, and arm him with authority to go anywhere at any time; nor do they create any exceptional rights of navigation.

They do, however, secure the franchise to pass over the navigable waters of a State, as freely as its own citizens may pass. Neither the Constitution, nor any act of Congress, ousts the States of custody of their streams, nor of police or municipal powers over them; but on the contrary, one of the things reserved to the States in undiminished fullness and vigor, is all their original jurisdiction over wharves, docks, turnpikes, ferries, bridges, and over all other matters of police.

Whether under the proffered or potential jurisdiction derivable from the Constitution, Congress might have gone farther, or might now go farther, and discipline the States, is not pertinent to this enquiry.

Under the National legislation as it stands, the police power of the States over streams within their own borders, has never

been successfully challenged, but the Supreme Court has invariably recognized and bowed to it. Thus, innumerable navigable streams have been bridged, and even dammed—always, when within a State, by the authority of that State: thus, have inspection laws, and health laws, quarantine laws and pilot laws, been imposed by States—laws, which pushing their powers out to the mouths of the greatest harbors, even to the *ostia regni*, lay hold of coasting vessels and foreign vessels, and their crews and cargoes, govern their speed, impose pilots and signals upon them, and detain them for days and weeks, when and where they list. Such visitations and delays, being in good faith, and impartial to all, consist, Vattell and Kent tell us, throughout Christendom with "free navigation" as Christendom understands it; and the Supreme Court has always declared, that the States may prescribe and enforce them without offense to the Constitution or laws of Congress.

Instances of the exact exertion of power by States here complained of, have become too numerous to count; the most stubborn and effective opposition to it, which money and learning could command, has often been brought into the field, but never with success. If one case can be found in which the right of a State to place a draw-bridge over its river has been ultimately denied, the counsel know it and can produce it. No such case is known to me.

The defendants deny the jurisdiction of the Court to grant this motion, and deny that the statute of New York violates the Constitution of the United States or any act of Congress; and they insist that, assuming the truth of every averment in the bill, the suit cannot be maintained.

1. The judiciary act declares, "That suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law." (1 U. S. stats. 82.)

Why, has not the complainant, by his own showing, a remedy at law, plain, adequate, and complete?

If the bridge is unlawful, and his barge, canal boat, or cargo is detained, injured, or destroyed, why can he not prove and recover his entire loss?

In the Wheeling Bridge case, Pennsylvania sued in virtue of her artificial and improved channels of communication; her

averment was that the bridge would injure and check the growth of her business, and hinder the increase of her tolls. There, was an instance of damage too vague, wide spread, and intangible, to be proved or computed at law. But here is nothing which cannot be weighed in golden scales.

Albany Bdge. case, 4 Blatch. 395, (opinion of Mr. Justice Hall.) New Jersey cases, 3 Wall., 783, 13 How., 590.

2. In all the cases known to the counsel for the defendant, the jurisdiction of the Circuit Court in such a case has been ultimately abandoned or denied, for still broader reasons.

In the Albany Bridge case, the jurisdictional point seems not to have been presented on the motion for a provisional injunction, which was asked for and allowed at chambers before the work was commenced. At the final hearing two justices sat, and there was a certificate of division. The first question on which the judges divided, was whether the Court had power to restrain the erection of the bridge in case it clearly appeared that the licensed vessels of the complainant would be materially hindered while engaged in commerce between the State of New York and other States. (1 Black., 582.)

On this question the Supreme Court stood equally divided, and the Circuit Court dismissed the bill. The complainant appealed to the Supreme Court, and the Court again dividing, the decree of dismissal was affirmed. (2 Wall., 403.)

It may be remarked in passing that a decree, though it result from division of the Court, is nevertheless authoritative as a precedent. (3 Wallace, 721.) This point will be referred to hereafter.

This ended the case, and the bridge was built, and a second bridge, and they stand undisputed monuments not only of the right of New York to bridge the Hudson, and of the harmlessness of the bridge in controversy, but of the want of jurisdiction in this Court in the pending case.

Mr. Justice Nelson gave no opinion on the final hearing, but Mr. Justice Hall examined, and denied the power of the Court in a strong review. This case is referred to here, for its special and literal application to the question of jurisdiction as distinguished from the general law of the case, and will be cited again with other cases, involving the same principle, which have received the assent of many courts, and the disapproval of none.

SECOND.

Passing from the jurisdiction of the Court, as separated from the merits of the case, to the general questions of law raised by the pleadings, the right of the State to erect and maintain the bridge in question, is believed to be indisputable upon principles established by uniform and abundant judicial authority.

Gibbons v. Ogden, 9 Wheat., 1; (Decided February, 1824;) (See pp. 9, 18, 19, 20, 113, 114, 118, and opinion Marshall, Ch. J., 203, 205.) Wilson v. Blackbird Creek Co., 2 Peters, 245; (Decided January, 1829.) People v. R. & S. R. R. Co., 15 Wend., 113; (Decided by Supreme Court New York, January, 1836.) (See opinion Savage, Ch. J., 132 to 135.) Palmer v. Comrs. Cayuhoga Co., 3 McLean, 226; (Decided by McLean, J., in Cir. Ct., July, 1843.) (See p. 227.) Cooley v. Port Wardens, 12 How., 299. (See 318 et. sec;) (Decided Sup. Ct. U. S., Dec., 1851.) U. S. v. R. R. Bridge Co., 6 McLean, 517. (See 523, 524;) (Decided by McLean, J., in Cir. Ct., July, 1855, three years after the Wheeling B. case.) Passaic Bridge Cases, 3 Wall., 782. (See 789 to the end;) (Decided by Grier, J., in Cir. Ct., Sep. 22, 1857.) Silliman v. Hudson R. Bridge Co., 4 Blatch., 395. (Op. of Hall, J., Oct., 1859.) Same case. 1 Black., 582. (U. S. Sup. Ct., Dec., 1861, on writ of error.) Same case, 2 Wallace, 403. (U. S. Sup. Ct., Dec., 1864, on appeal.) (*Memo*, Judge Nelson's views on motion for preliminary injunction are found, 4 Blatchford, 74.) Gilman v. Philadelphia, 3 Wallace, 713. (Decided U. S. Sup. Ct., Dec., 1865.) See pp. 720, 722, 725, 729, 730. Crandall v. Nevada, 6 Wallace, 35. (See p. 42.) (Decided U. S. Sup. Ct., Dec., 1867.)

1. It must be admitted that before the adoption of the Constitution of the United States, the States had power to bridge their streams.

The sole ground on which their power in this regard is challenged now, is found in these words of the Constitution: "Congress shall have power to regulate commerce with foreign nations and among the several States."

Treating this language simply as a warrant to Congress to exercise dominion over commerce, no scope to be ascribed to it, however great, can, without the aid of legislation, maintain the present suit.

Admit that Congress may do anything and everything affecting commerce, however remotely, and still the argument of the

complainant is not advanced a step. Why? Because, granting that Congress is omnipotent to do, we at once encounter the question what has Congress done, and on this the whole matter hinges.

If nothing has been done by Congress, the power to do is dormant, and, until it is exerted, it is as if it were not.

Concede that Congress may forbid bridges over the Hudson, or may prescribe their sites, elevations, and dimensions, the answer is that none of these things have been done, and therefore the ground on which such acts might rest, be it slippery or safe, is not in the question. What has in fact been done by Congress, and what legally results from it, will be considered hereafter.

But it has been contended that the commercial clause of the Constitution is more than a warrant to Congress—more than a power vitalized only by legislation; the idea seems to be that instead of being a delegation of authority and discretion to Congress, the language is itself a code of regulations—a self-speaking, self-acting, self-adjusting, self-executing system, which, if it does not provide for every case, at least serves the purpose of a dog in the manger to keep off the States.

This view is utterly repudiated by the courts in all recent cases, if not indeed in all cases.

The decisions already cited, hold that the field of legislation touching commerce, is open to the States, except where Congress has occupied it; that courts are empowered to execute the commercial clause of the Constitution only so far as Congress has embodied it in statutes; and that the States retain the power to enact all local and municipal laws on the subject, which do not come into collision with the National statutes. The established doctrine is, that general regulations, in their nature and object universal and uniform, pertain to Congress; and that provisions adapted to local considerations, fall within the jurisdiction of the States, and are not affected by the unexecuted powers which slumber in the Constitution of the United States.

1 Hill, 469; 3 Gray, 268; 18 How., 71; 1 Woodb. and Minot, 401; 2 Gray, 339; 11 Peters, 102; 5 How., 504.

2. The only act of Congress with which the bridge charter can conflict, is the act under which the complainant licensed his boats in the coasting trade.

I omit to mention of acts establishing ports, and the like, which treat the Hudson as a navigable stream, because without these acts the Court will take notice of the character of the river, and that the complainant's license gives him the right to navigate its waters.

The form of the license, is set down in the statute; these are the operative words: "license is hereby given to the canal boat called the Amelia to be engaged in carrying on the coasting trade for one year from date hereof, and no longer." (1 Stat. 307.)

It is insisted that this license gives the holder the right of free navigation on the Hudson, and we admit it.

We admit that each year for which the complainant obtains such a license, he may, within the district which the license covers, avail himself as freely as any other citizen, of all the facilities of navigation as he finds them, on the navigable waters of America.

But we deny that a coasting license, or the statute under which it issues, or the Constitution from which both proceed, has the effect to work a forfeiture of the domain of New York in the Hudson River.

We deny that a coasting license is an order that everything but the coasting trade shall halt.

We deny that the act of 1793 is an incumbus, smothering progress, dooming improvements, paralyzing the faculties of the States, and petrifying the physical features of the land.

We say that "free navigation," does not mean perpetual sameness in land, water or structures, but only means the free use of things as they are, by nature and by law. We say that the right to freely navigate a stream, in no sense implies that the stream is to be kept forever unchanged, except by nature. But who shall sanction changes? The General Government, in respect of structures purely local in their uses, is as powerless as the complainant thinks the State. Is the State also powerless?

By what right does New York dredge, and dyke, and dock the Hudson? These things are called improvements, but if the river must not be changed or meddled with by the State, measures to improve it are unlawful intrusions. This is inevitable, unless it shall be argued that whenever the State orders a work on the Hudson, and a Jerseyman can be hunted up to complain,

the Circuit Court of the United States may consider it, and if the Court thinks well of the project it may proceed as a lawful improvement, and if the Court thinks otherwise it must be arrested as piracy on the Constitution. A trespasser cannot defend his trespass by showing that by removing the soil or structure of his neighbor, he was, in his judgment, improving his neighbor's close.

By what right does the State of New York appropriate the head waters of the Hudson to feed her canals? Surely this is an impairment of the physical facilities and medium of navigation, and a clear trespass upon every holder of a coasting license, if the theory of the complainant be sound.

By what right has the State dam across the Hudson at Troy stood so long?

The erection of a draw-bridge is not an act of sovereignty, *sui generis*, far from it. The power exerted, is the same by which a State charters a water works company to supply a city by diverting water from a navigable stream. Every act which lessens the capacity of the Hudson, or increases the inconvenience of navigating it, is an exertion of the whole power in question here. Were the State to cause the forests which skirt the sources of the river, to be cut down, many of its springs would be dried up, and even this would obstruct "free navigation" in the sense in which the term seems sometimes to be employed.

In such a case it would hardly be contended, however, that a collision had occurred between the State statute and the coasting act.

3. Thus we are brought to the root of the question. Does the charter for a draw-bridge at Troy, in a legal sense, violate the coasting license of the complainant?

The bridge is for general use and traffic. The roads in which it will be a link, are, like the river, common highways. This fact distinguishes the case in two respects from the case of the Albany Bridge. In the first place, the controversy is not between railroad and river traffic, it is a conflict of common ways, each open to the whole public. The practical enquiry, is whether the public may go east and west by land, as well as north and south by water.

In the next place, the draw of the bridge, will be at all times instantly subject and obedient to the signals of vessels. In the

Albany Bridge case, it was said with great truth, that trains of cars not only occupy the draws of railroad bridges much of the time, but that passing at appointed hours, and running by time tables, they virtually hold command of the bridge and monopolize it, casting upon vessels the whole burden of delay. The utmost delay in opening the draw here will be while vehicles happening at the instant to be on it, are moving some part of 222 feet—a mere momentary detention.

Such being the superiority of the proposed bridge over the bridge above it, and over the two bridges below it, can it in law arrest or destroy "free navigation?"

What is free navigation—even in its physical meaning, what is it?

Is navigation "free" on the Ohio? The Supreme Court says it is, and yet near Wheeling, vessels must abandon the wonted immemorial channel, and seek a circuitous route through a drawbridge.

Is navigation "free" on the Passaic, on the Schuylkill, at Chicago, at Cleveland, on the Mississippi, on the Missouri, on the Niagara, on the Charles, on the Taunton? The Court says navigation is "free" on all these rivers, yet all are bridged by authority of States, and with bridges all too low for masts and spars, and some of them without even a draw.

The Rhine runs through seven sovereignties in the heart of Europe, as the map of Europe was, before its lines were trampled the other day by the horses of Germany. In 1865 the treaty of Paris made its navigation "free." Humboldt held the pen, and in the final act of the Congress of Vienna, the navigation of this and other rivers was declared "entirely free."

Bridges were not named, but bridges then studded these streams; time has multiplied them, and many of them can be passed only by means of draws; yet the treaty-making powers all agree that bridges do not violate the treaty, because in legal sense they do not affect "freedom of navigation."

Vattell gives us the reason. He says, "the right necessarily supposes that the river shall remain *free and navigable* and therefore excludes every work which will *entirely* interrupt its navigation."

The treaty of Washington has just made the navigation of the St. Lawrence "free;" here are the words: "the navigation of the

St. Lawrence shall forever remain free and open for the purposes of commerce to the citizens of the United States, etc." Is this treaty an empty voice, or must Canada prostrate the Victoria bridge, and never build another on any site?

Ascending the St. Lawrence, a large part of the distance is to be traversed by locks—is this free navigation?

Engineers insist that from New Baltimore to Albany, the Hudson should be turned into a canal. Should this be deemed necessary or expedient in future, will free navigation die?

Is there something attaching to the Hudson at Troy, which singles it out among rivers, and makes the question of bridging it exceptional? The defendants think there is.

The decree of the Supreme Court has adjudged that the State may bridge it, but so the Court has decreed of other rivers. This alone would seem decisive of the case as matter of law, but a peculiarity of fact is equally decisive. Just above the proposed structure, is a dam and a low bridge with one narrow draw —just below, are two bridges of less elevation than the one proposed, with much narrower spans, and one of them with no wider draw.

At this point of the argument the questions are, *first*, of power in the State to charter a bridge, and *second* of the legal consequences of this particular charter—the question of the wisdom of a multiplicity of bridges, is not here, and cannot be brought into a judicial forum. Keeping then to the point, namely the validity and legal effect of the charter, is it not a daring feat of logic to argue that a broad gateway, approachable only by narrower ones, is unlawful and a nuisance, stopping ingress and egress? Every floating thing which can pass existing structures, can readily pass the new one proposed; and yet the Court is asked to hold, not in the abstract, but upon a view of all the facts, that a navigation now free, will be destroyed or obstructed! If the complainant's argument has yet greater resource, the case has need of it.

State laws forbid vessels on the Hudson from moving at their accustomed rate of speed. State laws stop them, and compel them to take on a pilot. State laws bring them to anchor for days and weeks at quarantine. State laws confine fishing vessels to certain seasons, and modes of taking fish, and yet the same federal statute which gives a coasting license, gives a fish-

ing license of the same force and effect, and, *mutatis mutandis*, in the same words. With all these obstructions existing, together with the dam, and the bridges standing now, how can law or reason brand the proposed additional structure as a nuisance to the coasting trade because it will cause a detention not exceeding two minutes to each vessel passing its draws, and no detention at all to vessels passing under its spans?

4. Somewhere in this discussion the Court will expect a review of the authorities relied on by the defendants, and perhaps at this point, it will be well to refer to some cases already cited. No reported case has been found, and it is believed none can be found, in which the right to bridge a navigable stream of its own, and at its own unprompted and untrammeled discretion, has been denied to a State. The Wheeling Bridge case, in a random sense, might be deemed an exception, but that the Ohio River, instead of belonging to any one State, is the boundary of six States, and drains four others; and but for the further fact that the bridge proposed, was lower down the river than the territory of the State which objected. Did the Wheeling Bridge case hold that a State, in bridging its rivers, infringes the coasting act, or the Constitution of the United States, it would stand absolutely alone, and stand too overruled, not only by the Court which decided it, but by the judge who delivered the opinion, and by other judges who concurred. But the Court in dealing with the Wheeling Bridge, did not decide or consider, and could not decide any question now before this Court. Some of the features wherein that case was unlike this, are the following:

The suit was not brought by the holder of a coasting license, and therefore the rights of such a party, and the force and effect of such a license, and of the license act of Congress, were not involved.

The complainant was the State of Pennsylvania, and she invoked, as was her right, in the first instance, all the ample jurisdiction of the Supreme Court, derived as it is in a body from the Constitution itself, without the aid of statutes. The case shows that Pennsylvania was not interested in a single licensed vessel. She sued in right of her public works dependant on the Ohio, which had cost eighteen million dollars, and on which fifty million dollars of goods were carried annually. She

alleged, and proved, that an obstruction of the Ohio would cut down her tolls, or arrest their increase. The Ohio is a boundary river, dividing six States, and nourished by four others.

Virginia had entered into a compact with Kentucky, and with the United States, that "the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of the commonwealth, lies thereon, shall be free and common to the citizens of the United States." The Court had already held in Green v. Biddle, 8 Wheaton, 1, that this compact was a "contract," and that any State law in violation of it, was forbidden by the Constitution of the United States. Thus the obligations of Virginia touching the Ohio, were fixed and special. Her Legislature nevertheless, granted a charter to span the river with a bridge in which no draw was required. Under color of this charter, but in flagrant violation of it, the grantees erected a suspension bridge so near the water as to arrest absolutely all steamboats of the larger class.

The bridge cost $200,000, and the vessels it stopped cost a million six hundred thousand dollars, and carried one-half of all the goods and three-fourths of all the passengers between Cincinnati and Pittsburgh.

Upon such facts, the Court held, in short, that "something must be done," but even on such facts, it did not prostrate the bridge. On the contrary, time was given the defendants to try experiments, and at length a draw was put in a section of the bridge across another channel of the river, which had never before been frequented, and which would carry vessels out o heir course. This being accomplished, and a new track thus provided through a draw, the Court said the law was satisfied, and free navigation restored; and soon afterward Congress, to close the door against further possible complaints against the bridge, declared it a lawful structure and post-road.

The sequel to this history, is that almost a quarter of a century has rolled by, the bridge has stood, driving navigation round the back way, and yet navigation, and Cincinnati, and Pittsburgh, and Pennsylvania, all have flourished exceedingly. Mr. Justice McLean, who delivered the opinion of the Court against the bridge, had, nine years before, decided a case like that now at bar in our favor (3 McLean, 225); and three years

after the Wheeling Bridge case, he again decided a case like this, as we ask the Court to decide now. (6 McLean, 517.) The Chief-Justice, dissented in the Wheeling Bridge case, so did Mr. Justice Daniel. Judge Curtis was then in the Court, and the pages of 12th Howard attest his judgment in favor of the jurisdiction of States over their rivers. The views of Mr. Justice Grier were pungently stated by himself in the Passaic Bridge cases (3 Wallace, 782) five years after the Wheeling Bridge case.

Thus we see how little application, in law and in fact, that famous litigation has to the question before us, and we see also that five of the nine judges by whom it was decided, had the views of the law for which the defendants now contend.

I here take leave of the Wheeling Bridge case, and proceed to cases more in point, taking them up in the order of time in which they occurred.

In searching for grounds on which to maintain suits like that now before the Court, counsel have before referred to the case of Gibbons v. Ogden, 9 Wheat., 1. The defendants here, invoke the doctrines of that case, and I will state it. It went to the Supreme Court of the United States on appeal from the Court of Errors of New York.

Ogden filed a bill against Gibbons, setting up an exclusive right to navigate all the waters of New York with vessels propelled by fire or steam. A monopoly of steam navigation, had been granted by the Legislature of the State to Fulton and Livingston, and Ogden claimed as their assignee. The statute on which his right depended, declared that no vessel should enter the waters of New York by means of fire or steam, unless licensed so to do by Fulton or Livingston or their assigns, and denounced as penalty for violating the act, forfeiture of the offending vessel. The bill set up the statute, and charged that Gibbons had entered the waters of the State with steam, and without a license from the complainant. Gibbons answered that he held a coasting license, and under it had the right to proceed without any other permission. It appeared in the case that New Jersey and Connecticut had each retaliated by counter legislation. New Jersey had enacted pains and penalties against any one who should oppose her citizens in proceeding with their steamboats in their ancient channels, or who should attempt to exact money from them under the statute of New

York, and she gave an action in her own courts to enforce her will. Connecticut, by law, forbade entry to her waters by any vessel holding a license from the grantees of New York. The question was whether States could thus banish vessels of the United States from their respective waters, and farm out or toll, the privilege of entering their jurisdictions. The issue had nothing to do with the police, or municipal management, or jurisdiction of a river, physically—it related wholly to the equality, the franchise, the incorporeal right of way.

In the light of history, it seems strange now, that validity should have been accorded to State enactments, the obvious effect and object of which, was to war, not only on every coasting license, and against the spirit and letter of the act of Congress authorizing such licenses, but against the plain purpose and meaning of the Constitution, as proved not only by the text, but by contemporaneous annals. The courts of New York, however, maintained the power of the State thus to take tribute of commerce, by forcing enrolled and licensed vessels to buy permission to enter her gates. In the Supreme Court of the United States, Mr. Webster stated the whole argument against the position of the State, and he dealt heavy blows against the theory of the bill in this case. He disclaimed the idea (p. 9.) that the States could make no regulations affecting commerce, and insisted only, (I quote his words) "that *such power* as had been exercised in this case, did not remain with the States." He took care to say that he stated his "proposition guardedly."

Farther on, (p. 18.) he concedes the power of States over pilot laws, quarantine laws, and the like, and compares the power to enact such laws, with the undisputed right of States to regulate ferries and bridges. He treats as heresy (p. 19.) the notion that Congress "may establish ferries, turnpikes, bridges, etc., and provide for all this detail of interior legislation," and characterizes such matters as "internal legislation which no one has heretofore supposed to be within its powers"—(the powers of Congress.) Again he says, "all these things" (bridges, etc.) are in their general character, rather regulations of police, than of commerce in the constitutional understanding of that term." He illustrates by the river Thames, and by the fact that Parliament, or the Crown, has power to regulate commerce, but the City of London enacts health laws, etc., affecting the river, and

he adds that the City of London, could hardly grant a monopoly of the navigation of the Thames.

Mr. Oakley, Mr. Emmett and Mr. Wirt, discoursed at much length on the power of States to grant patents to reward inventors. Mr. Emmett called attention to the fact that the adoption of the Constitution had never been held to work the repeal of the pre-existing laws of States touching quarantine, etc. (p. 113.)

The opinion of the Court was delivered by Ch. J. Marshall. It decided but one point, because the case involved but one; namely that a State has no right to say that a coasting vessel shall not go, where an act of Congress says it may go. The reasoning of the Court, however, (pp. 203, 205) sheds light on the present case, and states the law as we insist upon it, in respect of the municipal and police power of States, even where its exercise affects commerce. Holding that such jurisdiction resides in the States, the opinion denies that Congress could authorize the erection of a bridge, unless for National purposes. Thus, the Court not only declared the power to erect bridges for local purposes to be in the States, but in the *States exclusively.*

One remaining observation of the Court is noteworthy, namely that Congress has construed the Constitution so as to leave to the States, police and municipal jurisdiction over their own waters. This latter remark is valuable. It is an antidote to the dogma that the recognition of quarantine laws, and various other State laws, by Congress, proves nothing in favor of their validity, because though void in themselves, and deemed so by Congress, they may nevertheless have been merely tolerated for convenience. This explanation has been seriously advanced, to break the force of the position, that State laws, with all the sovereign attributes of a charter for a bridge, having been held valid by Congress, the bridge-building power, has thus by necessary implication been settled, as far as Congress can settle it.

The construction given by Congress to the Constitution touching the reserved right of States to enact pilot and inspection laws, and the like, has been more recently emphasized in the same way by the Supreme Court; (12 How., pp. 318, 319, 321;) and yet, as lately as the Albany Bridge case, an attempt was made, and may be made here, to explain away the interpretation placed by Congress on the Constitution in this regard, by the curious hypothesis that acts of States, which were nothing but

sheer usurpations, and so regarded, were actually taken up and vitalized, by making believe they were laws, as if Congress could either delegate legislative power to the States, or ratify void State enactments, as a principle may ratify the acts of an agent.

The next case to which I ask attention is on all fours with the case in hand, even as the complainant states it.

Wilson vs. the Black Bird Creek Co., 2 Peters, 245, decided in 1829.

The stream therein question, was in the State of Delaware. It was tidal, and had from time out of mind been navigated. Under an act of Delaware, a dam was raised across it. Wilson sailed into the stream with the "Sally," a vessel of ninety-five tons, "regularly licensed and enrolled" under the laws of the United States, and, breaking the dam, passed it. The Dam Company brought trespass, and Wilson pleaded all the complainant pleads here: coasting license, public highway, tidal and navigable stream, right of free navigation, etc., etc. The Dam Company demurred, and the Courts of Delaware sustained the demurrer, and held the State had the power to dam the stream. The case was carried by writ of error to the Supreme Court of the United States, and argued by Mr. Coxe and Mr. Wirt. Chief-Justice Marshall was again the organ of the Court, and the decision was delivered five years after Gibbons vs. Ogden was decided. The Court (pages 250, 251) in broad terms asserts and vindicates the power of Delaware to do as she had done.

This case, so fatal to suits like the present, has been stormed by many counsel, always in the same way, and always in vain. The effort each time is to belittle it, and then brush it aside. It is said Black Bird Creek was a little stream. Mr. Wirt christened it "a reptile stream."—a baptism afterwards bestowed by Mr. Seward on the Hudson, at Troy. An English Judge once said "the Court can not measure the size of people's understandings;" and it is difficult to see how a Court can gauge the law in a case like this, by the measurement of a navigable stream in which the tide ebbs and flows, which from time immemorial has been navigated as a public highway, and to which the coasting act of Congress applies exactly as it applies to any other water.

The title of the complainant here is a coasting license—such

was the title of the navigator there. The coasting act provides for vessels of five tons burthen, the same license as for the mate of the Great Eastern: and the act and the license operated on Black Bird Creek in all respects as they operate on the Hudson.

The "Sally" was in fact nearly as large as the canal boat "Amelia," which ranges so promiscuously and extensively among "various States." Both held a license, the same even in letter. What then distinguishes the two cases? Can it be that a coasting license means one thing in Delaware and another thing in New York? Can it be that when the upper Hudson shall have become narrower and more shallow, as inevitably it must, the State of New York will thereby acquire greater Constitutional power than she possesses now? Can it be that political sovereignty depends on the latitudes, or names, or measurements of tidal navigable streams, or on the tonnage of the vessel whose owner sues?

The Black Bird Creek case, deals with a question of power over the physical condition of navigable waters in a State, and it decides that power to reside still where the Constitution found it, in the States. It has been said too, that the object of the dam was sanitary, not commercial; that it was built to drain a marsh as a measure of public health. What of it? The motive there was the public health; the motive here is the public interest and convenience. But what has motive to do with the existence of a power? The question whether sovereignty resides in a State, can never depend on the motive of its exercise.

Next comes the case of The People v. R. & S. R. R. Co, 15 Wend., 113, decided in 1836. The record of this litigation, with the judgment which ended it, stands not only as a great authority, but as a monument of learning, somewhat overshadowing, if not disparaging, to later efforts in the same field. The proceeding was by *Quo Warranto*, to test the right of a railway company to erect the bridge still standing at Troy, to which reference has repeatedly been made. The defendants pleaded a statute of New York, authorizing a railroad from Troy to Ballston Spa., which, as they insisted, and as the Court held, implied a license to bridge the Hudson. Mr. Stevens, Mr. Buell, and Mr. Butler, (then Attorney-General of the United States,) discussed the power of the State to authorize the bridge,

and but little more can be found in later records than was said there, on either side. (Pages 114, 115, 116, 118, 119, 122, 123.)

The opinion delivered by Chief-Justice Savage, explores the whole subject with remarkable vigor and thoroughness. I read from pp. 131 to 135. Here we have not the Black Bird Creek, but the "Arm of the Sea," now before the Court, and at a point too, only a mile distant from the site we are discussing. The moving papers tell us that the Hudson, at Troy, was a better channel then, than it is now; then it was unvexed by bridge or pier, and yet the Court said the State might span it at its pleasure with a low bridge, having only a tiny draw. The bridge was built, and built on a bare implication in a charter, as Mr. Webster said, the American Revolution was fought on a preamble.

Next in point of time, was the case of Palmer v. Cayuhoga Co., 3 McLean, 226, decided in the Circuit Court of Ohio, in 1843. It was an application for injunction to restrain the building of a draw-bridge over the Cayuhoga River. The ordinance of 1787 made the river forever free. The argument there was the argument here, fortified there, however, by the ordinance of freedom. Mr. Justice McLean refused the injunction, on the grounds stated by Chief-Justice Savage, in the case just cited. (See pp. 227, 228.) He says a State may dam or bridge a stream, provided by lock or draw, and without charge, vessels are allowed to pass.

Cooley v. Port Wardens, 12 How., 299, was decided in the Supreme Court of the United States, in December, 1851. The case arose on a statute of Pennsylvania imposing pilots of her own, on all vessels, and inflicting penalties for refusing to accept and pay them. The question was the power of the State over its navigable waters, and over vessels traversing them. Mr. Justice Curtis delivered the opinion of the Court, and the reasoning vindicates all we contend for here in principle. (See pp. 318, et. sec.)

The U. S. vs. R. R. Bridge Co., 6 McLean, 517, was decided at the Circuit in July, 1855, by Mr. Justice McLean, five years after his judgment in the Wheeling Bridge case.

The United States applied for an injunction to prevent the erection of the Rock Island draw-bridge over both channels of the Mississippi River, under the authority of Illinois. The case

was elaborately argued by the Attorney-General, and by Mr. Reverdy Johnson. The Court denied the injunction, on the ground that the States have authority, and exclusive authority, to cause such works. (See pp. 523, 524, 525.) The decision was acquiesced in, and the bridge was built. Some of the allegations of danger and difficulty in passing the draw, are curiously like those found in the moving papers here, and in disposing of them, the Court says, that the draw being wider than a narrow near by, it is certain that any boat finding room at the narrows, will find room at the draw. (Page 538.) This short decisive answer, applied to the bridges above and below the bridge now in question, may quiet some of the alarms manifested here.

The cases of the Passaic Bridge, decided by Mr. Justice Grier, in the Circuit Court, September 1857, came next. They are reported, 3 Wallace, 782. Milner and others, citizens of New York, filed bills to restrain the erection of two railway bridges over the Passaic River. One of the proposed sites, was in the City of Newark, and the other, two and a half miles below the wharves of the city. The railway company had long maintained a bridge higher up the river, and the object of the new bridges "was to shorten and straighten the road." The Passaic, is a tidal stream, and navigable some distance above Newark, and had in fact been navigated from time immemorial. Newark had been made a port of entry by act of Congress, and the United States had surveyed the river, and built light-houses, fog-lights, spar-buoys, etc., upon it. New Jersey had authorized bridges over it before, but their sites were all higher up the river. The proposed bridges were authorized by New Jersey, and required to have draws of sixty-five feet. Wharf owners and captains in "large numbers," swore to "their opinion that the bridges could not be erected, (this is the language of the report,) without obstructing the navigation by the detention of ice, and by causing bars, and shoals in the river, and without subjecting sailing vessels especially to a detention for a change of tide and wind, and for daylight, and to inconveniences and hazards generally, while it would probably subject wharf property, above the bridges, to a depreciation of 20 to 50 per cent. break up a system of tow boats that had got established in that river, and raise the price of freights." The resemblance be-

tween these dismal recitals, and those of the moving papers here, is such as to almost suggest a suspicion of plagiarism by a Jersey complainant.

In support of the motion, the authority chiefly relied on, after the Wheeling Bridge case, was the case of Devoe v. Penrose Ferry Co., in which Mr. Justice Grier had then recently granted an injunction in the first instance, and in which he seemed to feel constrained by the Wheeling Bridge case. The judge dismissed the bills, and in so doing, delivered a careful and pregnant opinion, in which, among other things, he holds:

1st. That prescribing bridges, and determining the height of piers, and width of draws, is not a judicial, but a legislative function. (p. 789.)

2d. That the police of the streams of a State, though they be tidal, and though ports of entry have been established on them, belongs to the State, and not to Congress or the Courts; this he affirms historically and legally. (pp. 789, 790.)

3d. That the Circuit Court of the United States affords no remedy, and possesses no power in such cases, other than those of the Courts of the State. At this point, the judge (pp. 789, 790,) pays a passing tribute to the practice of importing complainants from other States to give entrance to the National Courts in such cases.

4th. That the existence of a port of entry, does not change the law of the case. (p. 791.)

5th. That the power of Congress to regulate commerce does not "*include the means by which commerce is carried on within a State.*" (p. 792.) He says: "*Canals, turnpikes, bridges and railroads* are as necessary to the *commerce between and through the several States, as rivers, yet Congress has never pretended to regulate them. When a city is made a port of entry, Congress does not thereby assume to regulate its harbor, or detract from the sovereign rights before exercised by each State over her own public rivers.*"

Again he says: "*Congress by conferring the privilege of a port of entry upon a town or city, does not come in conflict with the police power of a State exercised in bridging her own rivers below such port. If the power to make a town a port of entry, includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads and canals—to land as well as water? Assuming the right (which I neither affirm or deny) of*

Congress to regulate bridges over navigable rivers below ports of entry, yet not having done so, the Courts cannot assume to themselves such a power. It is possible the Courts may exercise this discretionary power as judiciously as a legislative body, yet the praise of being 'a good judge' could hardly be given to one who would endeavor to 'enlarge his jurisdiction' by the assumption, or rather usurpation, of such an undefined and discretionary power.

The police power to make bridges over its public rivers, is asabsolutely and exclusively vested in a State, as the commercial power is in Congress; and no question can arise as to which is bound to give way when exercised over the same subject matter, till a case of actual collision occurs. This is all that was decided in the case of Wilson vs. the Blackbird Creek Co. (2 Peters, 257.) *That case has been the subject of much comment, and some misconstruction. It was never intended as a retraction or modification of anything decided in Gibbons vs. Ogden, or to the exclusive power of Congress to regulate commerce. Nor does the Wheeling Bridge case at all conflict with either. The case of Wilson vs. the Black Bird Creek Co. governs this, while it has nothing in common with that of the Wheeling Bridge.*"

(Pages 793, 794.)

The decree of dismissal was afterwards affirmed in the Supreme Court, by a division of the bench. (3 Wall., 720.)

By way of commentary on the observations of Judge Grier, I ask what distinction can be found between the power of Congress to regulate commerce on rivers, and commerce on railroads or canals? Congress may regulate the management of traffic on railroads, as it has lately done, in respect of starving and bruising cattle by long confinement in cars without food or water; but may Congress regulate the gauge, grade, alignment, and structures, of the railways of States?

Again, even supposing such a power to belong to Congress, may the Courts, in the absence of any action by Congress, regulate and adjudge such matters? Customs duties, are collected of commerce by rail and canal, exactly as of commerce by river or sea, but will it be said that Congress, and that the Courts without an act of Congress, may, and that the States may not, determine the location of tracks and locks, and their character, and dimensions? Certainly such powers, if exercised at all, must be for National purposes; and even for National purposes, it has not yet been held, though repeatedly urged upon Con-

gress, that a railway through States may be chartered by National authority. Assuming, however, that such works may be planted in States for National purposes, by what reasoning can it be insisted that structures entirely local in object and use, can be authorized by the United States? If local improvements are beyond the domain of Congress, and the States are bereft of their jurisdiction, the power to build a bridge resides nowhere.

The tread of man, has been ever on lines of latitude, rather than on lines of longitude. This is the fiat of Nature's laws. The geography of America, directs the destiny of population and enterprise, eastward and westward in an orbit belting the globe with industries and commerce.

The rivers of America, flow north and south: and it would be pitiable indeed, if a civilization, which, in its impetuous career, tunnels and levels mountains, ploughs through cities, and flings down and tramples out the habitations of the living, and the sepulchers of the dead, could be baffled by a sacred and impassable barrier, wherever a licensed canal boat wallows in the coasting trade. The history of every river, and the policy and jurisprudence of every State, laugh at such a theory. Man shrinks from crossing isothermal lines, and the products of the earth will not endure different zones and climes; the breadstuffs of the west, perish in the tropics, and wheat and corn from northern prairies will not bear transportation through the delta of the Mississippi and the Gulf of Mexico.

Thus, tracks across the Continent, on which travel and traffic may sweep from sea to sea, stayed by no obstacle which science can surmount, are as inevitable as the decrees of fate.

Next in time to the Passaic Bridge cases, is the case of the Albany Bridge. (4 Blatch., 74, 395.) The final hearing was in October, 1859. The similarity, or rather identity, between that case and this, is somewhat curious. The river was the same, the locality the same, the kind of structure the same, the counsel for the complainants the same, and finally the complainant the same in name and family. Even the last of these features, has perhaps as much legal efficacy, as the distinctions sometimes relied upon to depreciate the authority of the case of the Black Bird Creek. Mr. Justice Nelson, at Chambers, granted a preliminary injunction, assigning as a governing reason for doing so,

that no outlay having yet been made, the interests of the defendants would be consulted by postponing the commencement of the work till their rights were adjudged. He remarked also that no objection to the jurisdiction had been raised, and therefore, for the purpose of the interlocutory motion, he would assume jurisdiction, without, however, thereby committing himself upon the point. At the final hearing, the cause was most learnedly and fully argued, by Mr. Beach and Mr. Reverdy Johnson, for the complainants, and by Mr. Hill, Mr. Seward, and Mr. Reynolds, for the defendants. The Court divided. Mr. Justice Nelson gave no opinion: his views previously expressed on the motion, appear in 4 Blatch., 74. Mr. Justice Hall delivered an elaborate opinion against the bills, denying the jurisdiction of the Court, reviewing the authorities, and discussing the case at large. (4 Blatch., 395.) Few treatises on the subject, are more worthy of study. The certificate of division, stated, as the first point of difference, the jurisdiction of the Court, even assuming the bill to be proved in all its arts. Upon this question being presented to the Supreme Court, in December, 1861, the Court was equally divided. (1 Black., 582.) A decree was then made in the Circuit Court, dismissing the bill; from this decree the complainants appealed to the Supreme Court, and there the decree was affirmed by a divided Court, in December, 1864. (2 Wall., 403.)

Thus the judgment of the Supreme Court stands, concluding this case, as we insist. A second bridge followed the first, without challenge. The judgment in the Supreme Court in the case is, we hold, obligatory upon this Court as authority and precedent, irrespective of the fact that it was not pronounced by a majority of the Court. This has been held in other cases, and accepted as the law by other Circuit Courts, when held too by Justices of the Supreme Court. (Gilman v. Philadelphia, 3 Wall., 721.) The English courts, and our own, have accepted the binding authority of judgments resulting from divisions of the bench.

The Queen v. Millis, 10 Clark & Finnelly, appeal cases, 534, is a case of final judgment in the House of Lords, resulting from an equal division. Millis was indicted for bigamy. It was proved that he was married to Hester Graham, in Ireland, by a a Presbyterian minister, and that afterwards he married another

person in a parish church in England. The jury found a special verdict according to the facts above stated. The indictment and special verdict, were afterwards removed by *certiorari* into the Court of Queen's Bench in Ireland, and the case there argued. The judges delivered their judgments *seriatim*. They were equally divided. Afterwards, for the purpose of obtaining the judgment of the House of Lords, one of the judges, in form, withdrew his judgment, and thereupon the Court adjuged that Millis was not guilty. A writ of error was then brought, and the case argued in the House of Lords. In that body, sitting as a court of law, three members constitute a quorum, and the number participating in the case was four. The following is the entry, in the journal, of the final proceedings:

"It was ordered and adjudged by the House of Lords that the judgment given in the Court of Queen's Bench be and the same is hereby affirmed, and that the record be remitted to the end that such proceedings may be had thereupon, as if no such writ of error had been brought into this House." (Lords' Journal, March 29, 1844.)

In the "minutes of proceedings, on the same day," the entry is more full. It is as follows: "Regina v. Millis. (Writ of error.) The order of the day being read, for the further consideration of the case, the House proceeded to take the same into consideration, and it being moved to reverse the judgment complained of, the same was objected to, and the question was put whether the judgment complained of should be reversed? The Lords Cottenham and Campbell were appointed to tell the number of votes, and upon report thereof to the House it appeared that the votes were equal, that is, two for reversing and two for affirming. Whereupon, according to the ancient rule of the law, *semper præsumatur pro negante*, it was determined in the negative. Therefore the judgment of the Court below was affirmed, and the record remitted."

This final judgment, thus arrived at, was held to bind inferior tribunals in after cases, the same as if a united Court had pronounced it.

In Catherwood vs. Caslon, 13 Meeson & Welsby, 261, the Court of Exchequer held itself bound by the case of the Queen vs. Millis. Parke B. delivering the judgment of the Court, says: "Since the original argument, it has been decided by the House

of Lords in the case of the Queen vs. Millis, that unless in the presence of such a minister, such a contract does not constitute a valid marriage at the common law in this country; and by that case we are bound."

The case of Krebs v. The Carlisle Bank, was decided in the Supreme Court of the United States, by an equally divided Court. The effect of this decision, was subsequently considered in connection with the case of McDermond v. Kennedy, in the Supreme Court of Pennsylvania, and Chief-Justice Gibson spoke of it as "an authority in point." This view of the effect of a decree resulting from division, is considered and approved in a note to the case of Krebs v. Carlisle Bank, 2 Wallace, Junior, pp. 49 to 51.

Without authority, reason shows us that the decree of the Supreme Court in the Albany Bridge case, cannot be nugatory, because of the process by which the Court reached the result. Why did the decree bind the parties to it? Only because it was the decree of the Court. Did it not for the same reason bind every body who could be bound by a decree in the case? Did it not bind inferior Courts? Could the Circuit have properly disregarded it as authority, had the same complainant, or another, instituted a fresh suit afterward to challenge the validity of the bridge charter?

Could this Court fitly entertain jurisdiction now of a bill praying that the Albany Bridge charter be decreed null, and that the bridge be prostrated? Even entertaining such a bill, would the Court hold the question of its jurisdiction, and of the right of the State to grant the charter, still an open and original question? If not, why not? If the complainant were not a party or privy to the former suit, no principle of estoppel could bar him —then why would he not stand on an equal footing with the complainant now before the Court? The fact that the structure is the same, could not affect the case, but to divest the illustration of all identification of fact with the old suit, suppose the second and more recent bridge at Albany were thus assailed, would the Court hold that a bill, levelled at that bridge, might present itself, and bring with it all its claims of jurisdictional merit, the same as if the Supreme Court had never, although by division, decreed adversely in the case of the first bridge, and also in the case of the Passaic Bridge? This tests the question, and this test alone, is, I insist, fatal to this motion.

We are farther and fully fortified at this point, by the fact that the principles established by a division of the Supreme Court, in the Albany Bridge case, have since received the positive approval of a majority of the Supreme Court.

In December, 1865, Gilman v. Philadelphia, (3 Wall., 713,) was decided, with the concurrence of five members of the Court, Mr. Justice Nelson being absent. Gilman, a citizen of New Hampshire, filed a bill to restrain the erection of a bridge over the Schuylkill River. He was not the holder of a coasting license, but a wharf owner, the decision, however, in no degree turned upon the nature of his interest; the case was treated as having all the merit a coasting license could impart. (See pp. 722, 725, 729.) The Schuylkill is tidal above the City of Philadelphia, and navigable by vessels drawing eighteen or twenty feet of water; the coal trade upon it, is large, employing many licensed vessels owned in different States, and millions are invested in the wharves to which these vessels ply. It is an ancient highway of navigation, and the Court treated it as a stream having all the constitutional and legal attributes of any river flowing within a State, and covered by the coasting act.

The Legislature of Pennsylvania, in 1857, authorized Philadelphia to erect a bridge without a draw, at Chestnut Street, and within 500 feet of another bridge already standing. It was admitted by the defendant that the bridge was to be not more than thirty feet high, a pier was indispensable, and the navigation at that point required a wide channel, (p. 720.) Vessels with masts could not pass, and it was not disputed that navigation would be sensibly obstructed. Mr. Justice Grier dismissed the bill in the Circuit, without argument, holding himself bound by the decision resulting from a division of the Supreme Court in the Passaic cases, (p. 720.) The case was carried to the Supreme Court, and there decided in December, 1865. Mr. Justice Swaine delivered the opinion of the Court, (p. 721.)

The Court among other things says: (p. 725.) "*The power to authorize the building of bridges, is not to be found in the federal Constitution. It has not been taken from the States. It must reside somewhere. They had it before the Constitution was adopted, and they have it still.*" (p. 725, see also, p. 730.) The decree of the Circuit Court was affirmed. Here we have the judgment of a majority of the Supreme Court sustaining all we contend for in the present case, and something more.

But the Court is again recorded in the same way, in the case of Crandall v. Nevada, (6 Wall., 35,) decided in Dec., 1867. The State of Nevada had imposed a tax on railroad and stage companies for every passenger carried out of her limits, and the question was upon this statute. The case depended in part upon the power of States touching commerce. The Court (per. Miller Justice, p. 42.) reaffirms the case of Gilman v. Philadelphia, and the doctrines it lays down. The opinion says:

"In the case of Cooley v. Board of Wardens, four years later, the same question came directly before the Court in reference to the local laws of the port of Philadelphia concerning pilots. It was claimed that they constituted a regulation of commerce, and were therefore void. The Court held that they did come within the meaning of the term 'to regulate commerce,' but that until Congress made regulations concerning pilots, the States were competent to do so.

"Perhaps no more satisfactory solution has ever been given of this vexed question, than the one furnished by the Court in that case. After showing that there are some powers granted to Congress which are exclusive of similar powers in the States because they are declared to be so, and that other powers are necessarily so from their very nature, the Court proceeds to say, that the authority to regulate commerce with foreign nations and among the States, includes within its compass powers which can only be exercised by Congress, as well as powers which from their nature, can best be exercised by the State legislatures; to which latter class the regulation of pilots belongs. 'Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.' In the case of Gilman v. Philadelphia, this doctrine is reaffirmed, and under it a bridge across a stream navigable from the ocean, authorized by State law, was held to be well authorized in the absence of any legislation by Congress affecting the matter."

Through all these cases runs in an unbroken current, a principle, which, correctly applied, will solve every problem of State and federal jurisdiction, relating to the commercial clause of the Constitution.

Legislation, the nature and object of which require it to be uniform and universal in its operation throughout the Union, pertains to Congress.

Legislation, the nature and object of which require it to be special and exceptional, and confined and adapted to particular localities and individual cases, pertains to the States.

This solution dispenses with technical and minute distinctions between "commercial regulations" and "police regulations:"—it strikes through words at things, and draws strong and practical lines of demarkation between the affairs of the Nation, and the affairs of the States. It preserves also the true theory of all self-government, and of our government especially, by committing to each community its own business. This is its effect in legislation; in judicial proceedings, its mandate is still more imperative and obvious. Whether Congress be or be not restricted by such a rule, certain it is that the rule has not yet been transcended by National legislation, and until it shall be so transcended, Courts are bound to observe it.

5. Did the complainant's allegations of fact, tend in any degree to invest the present case with exceptional merit, I could not, after consuming so much time, ask to be heard long upon that branch of the case. It is not likely ever to be reached by the Court, and all the substantial allegations are overthrown by the answer and the answering affidavits. A few remarks will indicate sufficient reasons for regarding the proposed bridge as one exceptionally harmless. The most labored parts of the moving affidavits, consist of "opinions," that piers will change the bed and channel of the river, by causing shoals, bars, etc.

Such speculations were more or less potent once, but they are worthless now, and out of date. Science and experience have learned to avoid and remedy all such effects. This is true in general, as the affidavits of eminent engineers inform us, and as the Court knows as part of the public history of our times.

Piers tend to scouring out the bottom as the affidavits say, to such an extent that *rip raps* around them are customary to shield them against undermining water. This truth is so notorious, that in December, 1872, Congress forbade the use of *rip raps* in bridging the Ohio.

In the case before us, we have much sworn testimony that no harm or injurious change will come to the bottom or current of the river, from the presence of sharp and exactly adjusted piers. But there are two mute and unsworn witnesses, who testify more unanswerably and instructively than all others. I mean the two bridges, standing with their piers on the same bed, and in the same current, just below. Year after year, these piers have worked out the problem of their influence on the action of the

water at every season. The bottom there and at the proposed site, are proved to be of the same material. Ice and freshets, have beat upon these structures, and worked on the river bed, and the piers have proved as guiltless of wrong to the river, as of injury to commerce. Their innocence in both respects, appears in one fact which can never be sworn down or answered, and that is the tariff of freights. Freights on merchandise carried by vessels passing these bridges, are no higher since the bridges, than before. Witnesses may differ in opinion, and even in the evidence of their own senses; they may assert and deny that bars and shoals will be or have been; but to learn the effect of the bridges on navigation, past mistake, the fact must be weighed in golden scales. If in truth, navigation had been made hard or hazardous by these bridges, the price of freights would say so, as quickly and as surely as the needle tells us of the pole. A ponderous telegraph cable looped down to the river's bed, may nurse a passing sandbar, or scrape a deep ploughing keel; but the practical facility with which vessels move, measures the cost of river transportation, and transportation makes no mistakes against itself.

In view of the experience at Albany, it is natural that vessel owners, wharf owners, and navigators, combine with the whole community at Troy and West Troy, save only the owners of the one boat ferry, in favor of the bridge, now proposed, as the affidavits abundantly prove they do.

A pretended exhibit is made, imposing in proportions, of the vessels registered at Troy, which will be subjected to passing the proposed draws.

The analysis made of the truth in this respect, in the answering affidavits, by the vessel owners themselves, compels the belief that the complainant's case in one respect at least is sheer exaggeration. In the absence of the facts, the Court could hardly have believed the need of a draw, so limited as it turns out to be, or that those who are to use it, are so united in its favor.

The allegation that passenger boats cannot turn from the present landing so conveniently with the bridge, as without it, even if it were true, and the complainant entitled to champion their interest, is of no importance. The answer to it is, that in Troy, as in Albany and elsewhere, the steamboat landing can

easily be changed to the foot of another street. That there are ample landing places for passengers, even more eligible than the place now used, is abundantly proved by the affidavits.

The allegation that barges with spars can pass only by the draws, even if it were material, is answered by the fact that spars on barges are used only as dericks, and, even for this purpose, are virtually obsolete.

The anticipated awkwardness in high water, of moving "tows" to and from the side cut across the river, rests wholly in conjecture; it is fully denied, and even if the Legislature had not fixed the site of the bridge, and the allegation were proved, it could not effect this motion or the final decision of the case. The only adequate dispensation for this kind of navigation, is an act of Congress enrolling and licensing "tows," and authorizing them to "swing around" and spread themselves wherever grass grows or water runs.

I leave the complainant's allegations of fact, with one remark. Those who have traversed the interminable proofs in the Albany Bridge case, and caught glimpses of the terrific visions of impending ruin and desolation, which frightened the Court and unmanned Troy, and who know also how grimly ludicrous time has made these delusions, must smile at the mimic the attempt made now, to conjure up such spurious and musty apparitions.

THIRD.

But one point remains to be referred to, a point which, could it have received the judgment of the Court before proceeding further, would have been presented in front of the case.

The delay of the complainant, in asking for an injunction, is of itself, a full answer to this motion. Whoever, with knowledge of the facts, allows another to incur burdensome obligations and make large expenditures, which an injunction, asked for in session, would have prevented, forfeits his right to such a remedy, and the want of equity in this motion, is in the proportion in which the defendants will be damnified by granting it.

Hilliard on Injunctions, p. 24, § 43. Tash vs. Adams, 10 Cush., 252. Grey vs. Ohio & Pa. RR. Co. 1 Grant's cases, 412. Binney's case, 2 Bland. Ch. R's. 99. Real Del. Mining Co. vs. Pond, &c., 23 Cal. 82. Story's Eq. Jurisprudence, § 959, A.

The fact that the complainant filed his bill in October, 1872, is no answer to this objection—he was guilty of laches there also, but had the suit been seasonable it would not cure the delay in asking for a provisional injunction.

At this point I beg the Court to scrutinize section seven of the charter, found on page 10 of the bill. It will there be seen that the complainant was entitled to no delay whatever in objecting to the work. Everything complained of, even the location of the west pier in reference to the canal, is set down in the statute; and preceding sections, fix the times of all preliminary proceedings.

The final issue, the defendants were and are ready to meet—they had a right to go on, and were bound to go on with their work, and abide the result in the end. They had a right to hasten the completion of the bridge, for the very purpose of refuting by actual demonstration, the charges in the bill. Their diligence shows good faith in their undertaking, and also in their answer: it was therefore meritorious and favored of the law.

Again, the defendants had a right to assume that the complainant would attempt more promptly, if at all, to tie their hands. All this would be true in any case.

But in this case, there is a special and controlling fact: in this case, silence was double acquiescence. The statute creating the Bridge Company, compelled it to go on, suit or no suit, unless actually ordered by the Court to desist. (See section 7.) This fact clinches the laches of the complainant, and stops him here on the threshold. Having, with full knowledge, lain by, fourteen months, he is barred when he comes now with affidavits six months old, and seeks on conjecture to inflict grievous injury on the defendants, by arresting costly works now nearly completed, which having himself encouraged, he at last attempts prematurely to slander and destroy.

Were all the law as argued for the complainant, and were all the facts and merits as he represents them, still, at this late hour, equity would say, "you are too late for preliminaries now, you have passed that stage of the proceedings—you have waited until the defendants have gained, at large cost, the right to demonstrate exactly and certainly by actual trial of their bridge, the truth or falsity of your predictions, and both sides must abide for a brief space, the sure arbitrament of time."